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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO. 81-5062

RONALD EUGENE RICKMAN,

PETITIONER,

V.

STATE OF TENNESSEE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statutory aggravating circumstance in Tenn. Code Ann. § 39-2404(i)(5) is unconstitutionally void for vagueness and overbreadth.

2. Whether the sentence of death as applied to petitioner was disproportionate.

3. Whether the Tennessee statutes and rules on comparative review of death sentences render the imposition of a death sentence unconstitutional.

4. Whether the non-inclusion of final argument, to which no objection was raised and on which no issue was questioned in the motion for new trial, deprives petitioner of due process of law.

5. Whether excusing prospective jurors who made it unmistakably clear that they could not consider imposing a sentence of death violated petitioner's right to an impartial jury.

6. Whether the issue concerning handcuffs can be properly raised since there is no proof in the record that any prospective juror saw the petitioner in handcuffs.

7. Whether the jury instructions given were inconsistent with case law on the imposition of a sentence of death.

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OPINIONS BELOW

The opinion of the Tennessee Supreme Court is reported at 615 S.W.2d 142.

JURISDICTION

Petitioner seeks to invoke this court's jurisdiction under 28 U.S.C. § 1257(3). Respondent submits that this record does not present a substantial federal question. The judgment of the Tennessee Supreme Court was entered on February 17, 1981. Petitioner's petition to rehear was denied on April 27, 1981. After receiving an extension of time, petitioner timely filed his Petition for Writ of Certiorari with this court.

STATEMENT OF THE CASE

Ronald Eugene Rickman was indicted with William Edward Groseclose, Barton Mount, and Phillip Britt for first degree murder by the Shelby County Grand Jury in September 1977 (R: [orders, pleadings, and minute entries] 2-5, 25-28). The jury selection process began on February 13, 1978, continued through, and was completed on February 17, 1978. During this voir dire, seventeen prospective jurors were excused by the trial judge because they explicitly expressed an inability to follow the law and instructions of the court on the death penalty. (R: [transcript of voir dire] 3, 22-26; 55-58; 294-297; 309-313; 315-316; 373-378; 426-431; 625-630; 711, 714-724; 743-748; 752-758; 995-1005; 1007-1016; 1042-1046; 1102-1119; 1194; 1196-11991 1202-1206; 1277-1281). On most of these jurors, petitioner made no objection to the excusal for cause.

The seven day trial commenced on February 18, 1978 and was completed on February 28, 1978. After due deliberation, the jury found petitioner and his two co-defendants Britt and Groseclose guilty of first degree murder. (R: [orders, pleadings, and minute entries], 160-161). On March 1, 1978, the sentencing hearing

began. It continued through and was completed on March 3, 1978. After due deliberation, the jury returned its verdict on March 4, 1978, fixing the sentence for petitioner Rickman and defendant Groseclose at death. The jury unanimously found the following statutory aggravating circumstances: (1) the defendant committed the murder for remuneration; (2) the murder was especially heinous in that it involved depravity of mind; and (3) the murder was committed while the defendant was engaged in the commission of rape, robbery and kidnapping. The jury unanimously found that there were no mitigating circumstances sufficiently substantial to outweigh the listed statutory aggravating circumstances. (R: [orders, pleadings, and minute entries], 166).

Petitioner Rickman filed a timely motion for new trial but did not raise any issues concerning improper excusal of prospective jurors, the court's jury instructions, the prospective juror's "viewing" of petitioner in handcuffs, or closing argument of counsel. (R: [orders, pleadings, and minute entries], 204-205). This motion was overruled. The petitioner appealed to the Tennessee Supreme Court which affirmed the judgment. In his appellate brief, petitioner challenged only the constitutionality of the Tennessee statute on the death penalty.

REASONS FOR DENYING THE WRIT

Respondent insists that the Tennessee Supreme Court correctly affirmed the trial court's judgment approving the jury verdict finding the petitioner guilty of first degree murder and fixing his punishment at death. The Tennessee Supreme Court did not decide a federal question of substance not heretofore determined by this court or decide such a question in a way not in accord with the applicable decisions of this court. Nor did the Tennessee Supreme Court decide a federal question in a way in conflict with another state court of last resort or of a federal court of appeals. See Supreme Court Rule 17.1. There being no special and important

reasons for a grant of certiorari in this case, the court in its sound judicial discretion should deny the writ sought here.

ARGUMENT

I.

TENN. CODE ANN. § 39-2404(i)(5) IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD.

Petitioner contends that Tenn. Code Ann. § 39-2404(i)(5), an aggravating circumstance, which provides "the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind," is vague and unconstitutional. The same allegation was raised in Proffitt v. Florida, 428 U.S. 242, 255-256 (1976) in which this court held that an identical aggravating circumstance under the Florida death sentence statutes was not impermissibly vague as it has been construed by the Florida Supreme Court. See Gregg v. Georgia, 420 U.S. 153, 200-203 (1976). See also Spinkellink v. Wainwright, 578 F.2d 582, 610-612 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979).

The Florida Supreme Court construed this provision to be directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 183 So. 2d 1, 9 (Fla. 1973). The Florida Supreme Court also recognized that this provision was directed by its legislature at something "especially" heinous, atrocious or cruel. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). In Dicks v. State, 615 S.W. d 126, 132 (Tenn. 1981), the Tennessee Supreme Court approved these constructions of this aggravating circumstance. The court specifically found this construction applicable to this case. Groseclose v. State, 615 S.W.2d at 151. The trial judge's instructions to the jury in the instant case are compatible with these constructions. (R: [transcript of trial], 2447). Such a construction is applicable in the instant case. The factual circumstances which the jury found in the instant case, the death by systemic hyperthermia, "cooking," of this victim in the trunk of her car which had been abandoned with the participants' knowledge that the victim was alive, show that such an interpretation

is applicable in the instant case. Groseclose, 615 S.W.2d at 148 and 151. These facts do not show an improper application of this aggravating circumstance. See Godfrey v. Georgia, 446 U.S. 420 (1980).

II.

THE SENTENCE OF DEATH IS NOT DISPROPORTIONATE IN THIS CASE.

Under Tenn. Code Ann. § 39-2406(c) the Tennessee Supreme Court is required to determine whether the evidence supports the jury's finding and whether or not the sentence of death is "excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." In this case, the Tennessee Supreme Court applied this standard finding that "By any standard of comparison, where the public policy of a jurisdiction, as reflected in its statutes, authorizes the death penalty, the facts and circumstances of this case justify the action of the jury and of the trial judge in imposing it upon these appellants [Groseclose and Rickman]" 615 S.W.2d at 150. When this issue was again raised in the petition to rehear the Tennessee Supreme Court found that "[a] case with facts so aggravated and shocking can scarcely be conceived, and no similar case or cases in which the death penalty has not been imposed in circumstances similar to those shown in this record has come to our attention." Id. Such findings show that a sufficient proportionality review has been conducted. See Proffitt v. Florida, 428 U.S. 242, 259 n. 16 (1976); State v. Shaw, 255 S.E.2d 799 (S.C.), cert. denied 444 U.S. 957 (1979).

Petitioner Rickman, by adopting his co-defendant Groseclose's petition, also contends that the application of the death penalty to him is disproportionate since co-defendant Britt did not receive a death sentence. The Tennessee Supreme Court properly rejected this argument. The petitioner's argument would support a mandatory death penalty such as those found unconstitutional in

Roberts (Stanislaus) v. Louisiana, 428 U.S.325 (1976). Such a death penalty lacks the focus on the character and propensities of the individual defendant. In the instant case, co-defendant Britt's testimony shows his youthful age, 20 years; his repentance at having committed this crime, which he acknowledged committing; and the possible influence or domination by co-defendant Rickman in his participation. The testimony of petitioner Rickman during the penalty phase described his background and major involvement in this killing. It showed none of the mitigating factors available to co-defendant Britt.

Petitioner also complains that the jury should have been allowed to hear the evidence of Ralph Hadley and Hugh Stanton concerning negotiations of a guilty plea. This evidence refers only to co-defendant Britt (R: [transcript of trial], 1956-2010) and is irrelevant to the jury's consideration in this particular case. Groseclose, 615 S.W.2d at 149-150. Lockett v. Ohio, 438 U.S. 586, 604 n. 12 (1975).

III.

THE TENNESSEE PROVISIONS FOR APPELLATE REVIEW ARE CONSTITUTIONALLY SUFFICIENT.

Tenn. Code Ann. § 39-2406 is patterned after the appellate provisions of Georgia's statutes. Tenn. Code Ann. § 39-2406 does not, however, require specific referral to the cases compared in determining the proportionality of the sentence as is required by the Georgia statute. See Gregg v. Georgia, supra, 420 U.S. at 205 n. 56. However, this court in Proffitt v. Florida, supra, 428 U.S. at 259, held that where the appellate court made such a proportionality comparison, the statute, as interpreted, provided for sufficient appellate review. This court made such review in this case. 615 S.W.2d at 150.

IV.

THE NON-INCLUSION OF THE TRANSCRIPT OF ARGUMENT OF COUNSEL DOES NOT DEPRIVE PETITIONER OF DUE PROCESS.

Trial counsel for petitioner Rickman certified the trial transcript as complete for purposes of his appeal (R: 238-239; V. 28). Petitioner raised no issue concerning this argument. The non-inclusion of this argument does not show a due process violation or warrant the grant of the writ of certiorari. See Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, 96 (1978) cert. denied 439 U.S. 991 (1978).

V.

PROSPECTIVE JURORS WHO MADE IT UNMISTAKABLY CLEAR THAT THEY COULD NOT CONSIDER THE DEATH PENALTY WERE PROPERLY EXCUSED FOR CAUSE.

In Witherspoon v. Illinois, 391 U.S. 510 (1968) and Lockett v. Ohio, 438 U.S. 586 (1978), this court held that the trial judge could properly excuse for cause any juror who explicitly expresses an inability to follow the law and instruction of the trial judge on capital punishment. Despite petitioner's not having raised this issue in his motion for new trial, the Tennessee Supreme Court, after a complete review of the record, concluded that these prospective jurors were properly excused for cause and noted that petitioner had not used his peremptory challenges.

Petitioner alleges that prospective juror Rose (R:[transcript of voir dire], 1102-1119) constitutes the "most striking example" of the erroneous application of Witherspoon. This individual, however, states in response to questioning from the trial judge that under no circumstances could he vote to apply the death penalty. "I don't see how any evidence could be presented to make me vote for the death penalty." (R:[transcript of voir dire], 1119). The trial judge thus properly excused this prospective juror for cause under existing decisions of this court.

VI.

THERE IS NO EVIDENCE IN THIS RECORD THAT ANY PROSPECTIVE JUROR SAW THE PETITIONER IN HANDCUFFS.

The petitioner's allegation is not documented in this record. (R: [transcript of voir dire], 695-696). Groseclose, 615 S.W.2d at 148. Upon such a basis, this issue, which was not raised in petitioner's motion for new trial, does not warrant the granting of a writ of certiorari.

VII.

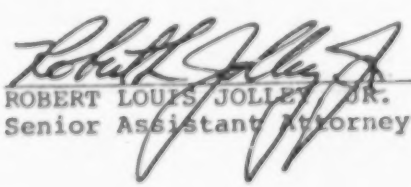
THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY DURING SENTENCING.

The Tennessee Supreme Court found, 615 S.W.2d at 147-148, that the jury instructions given closely followed the Tennessee statutes which the court had previously held constitutional. Houston v. State, 593 S.W.2d 267 (Tenn. 1980), cert. denied, 101 S.Ct. 251 (1980). Petitioner Rickman raised no objections to these instructions in the trial court and also seeks to rely on his co-defendant Britt's special requested instruction (R: [transcript of trial], 2454-2455). Under such circumstances, the petitioner has not raised an issue which warrants the granting of the writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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